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Supreme Court, U.S.
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No. 91-996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

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FEB 19 1992
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SUPREME COURT, U.S.

PEOPLE OF THE STATE OF CALIFORNIA PETITIONER

vs.

CESAR ELIAS CRIBAS RESPONDENT

ON WRIT OF CERTIORARI

TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT DIVISION THREE OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

WITHOUT AFFIDAVIT OF INDIGENCY

The respondent, Cesar Cribas, asks leave, through his appointed counsel Charles R. Khoury Jr., to file the attached Brief in Opposition to Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis without an affidavit of indigency.

Respondent has been previously granted leave to so proceed in

the Superior Court, the Court of Appeal and the Supreme Court of the State of California.

The affidavit of respondent, who lives 3,000 miles from his present attorney, will be provided as soon as it is received from him.

Charles R. Khoury Jr.

Attorney for Respondent

No. 91-996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

PEOPLE OF THE STATE OF CALIFORNIA PETITIONER

vs.

CESAR ELIAS CRIBAS RESPONDENT

ON WRIT OF CERTIORARI

TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT
DIVISION THREE OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles R. Khoury Jr.
Attorney at Law
P.O.Box 1066
Wilton NH 03086
(603) 654-2050

Attorney for RESPONDENT

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REQUEST FOR WAIVER OF RULE 15 APPLICATION

This opposition is provided to assist this Court in deciding whether to grant or deny the petition filed in this case. It is not timely since counsel has 1) been involved in preparing four lengthy appeals, all involving murder and /or kidnap and 2) has had an extended bout of flu. Counsel requests the Court to waive the application of Rule 15 and to consider the opposition before deciding to grant or deny the petition for writ of certiorari in this case.

STATEMENT OF FACTS

Respondent relies on the Statement of Facts as they appear in the Court's opinion below which is attached to the Petition for Writ of Certiorari. Factual errors which appear in the Petition are:

At page 16, the petition erroneously states that the trial court "ruled the statements obtained could be used by the prosecution for impeachment purposes." The petition cites page 276 of the Clerk's Transcript and page 53 of the Reporter's Transcript. Those pages are attached to this Opposition and clearly show that the trial court did not exercise any discretion to limit his ruling to impeachment. The prosecution was allowed, by the judge's ruling, to use the taped statements of respondent for any purpose it wished. The statements were admitted into evidence during the prosecution case-in-chief, with the understanding respondent would testify and the taped statements would be used to impeach him on either cross-examination or rebuttal. (RT 313.)

RESPONSE

1. THE STATEMENTS WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY."

2. ON THIS RECORD, RESPONDENT'S CONFESSION, SECURED IN VIOLATION OF HIS RIGHT TO COUNSEL, RENDERED IT INADMISSIBLE FOR ALL PURPOSES INCLUDING IMPEACHMENT.

3. INDEPENDENT STATE GROUNDS WERE RELIED UPON BY THE STATE COURT OF APPEAL DECISION IN THIS CASE.

ARGUMENT

I

THE STATEMENTS OF RESPONDENT WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY" ON THEIR FACE.

The government involvement in the securing of the taped phone conversations in this case was nothing short of the overreaching condemned by this Supreme Court in United States v. Henry (1980) 447 U.S. 264, 274. After respondent was jailed and appointed counsel, the police specifically asked Luisa to question respondent about the rape after they placed her in a motel room at police expense. Petitioner concedes this was a violation of the Sixth Amendment (fn. 5 p. 20 of the petition.)

Petitioner states at page 35 of the petition that even though the statements were taken in violation of the Sixth Amendment, they were "otherwise voluntary and trustworthy."

A simple reading of the Court of Appeal opinion attached to

the petition shows this not to be so. In the taped conversation set forth in the opinion, Luisa tells respondent that she will help him get out of jail only if he tells her why he raped her.(Petition, A7-A9.)

On their face these statements, amounting to his confession, cannot be considered voluntary and trustworthy to use for any purpose, including impeachment.

II

ON THIS RECORD, RESPONDENT'S CONFESSION, SECURED IN VIOLATION OF HIS RIGHT TO COUNSEL, RENDERED IT INADMISSIBLE FOR ALL PURPOSES INCLUDING IMPEACHMENT.

In People v. Gonyea (1984) 365 N.W2d 136 , the Supreme Court of Michigan was faced with an obvious Sixth Amendment violation when police officers gained incriminating statements from the defendant after his sentencing and without his attorney's permission. That court held:

> [T]he right to counsel both ensures the defendant an adequate defense against all forces of the state, and ensures the practical enjoyment of many other rights accorded a defendant. Thus any transgression of this right not only leaves the defendant vulnerable or helpless against the system but jeopardizes the realization of other rights.

People v. Gonyea supra at p. 144.

The Supreme Court of Michigan held the statements unusable by the state for any purpose including impeachment. The court went on to speak directly to the issue of "condoning perjury".

> In support of this position we have just taken, we note that the right to counsel has also been argued to be of such fundamental importance that it was unnecessary for us to even balance the violation of this right against condoning perjury.

Id. at p. 144.

The court then discussed New Jersey v. Portash, (1979) 440 U.S. 450. In that case, immunized, compelled testimony was used to impeach the defendant at his trial. This Supreme Court reversed as this violated "the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." (Id. at-458-459.)

The Michigan court held that, by analogy, they were confronted with the right to counsel "in its most pristine form" and refused to balance the need to prevent unlawful police conduct against the need to prevent perjury. People v. Gonyea supra at p. 143.

In the instant case, when one is incarcerated awaiting trial and has counsel, as did respondent, the violation of that right to counsel in the manner done here is as egregious as the constitutional violation of Portash supra. Respondent had to feel compelled to give Luisa the answer she wanted.

The same analogy and the same result should and did obtain in the state court of California, namely the refusal of that court to condone use of the confession for any purpose including impeachment of respondent.

III

INDEPENDENT STATE GROUNDS WERE RELIED UPON BY THE STATE COURT IN THIS CASE.

The state court in the instant case relied upon People v. Whitt (1984) 36 Cal.3d 724, a California Supreme Court case involving a Sixth Amendment deprivation. That case in turn held that due to the identity of the Sixth Amendment with article I section 15 of the California Constitution, all references to the Sixth Amendment would be deemed references to article I section 15. (People v. Whitt supra at fn.8.)

People v. Gonyea supra at pp.144-145, relies on independent state grounds for its holding. (Cf.Bunnell v. Superior Court (1975) 13 Cal.3d 592, 601, California courts look to both Fifth Amendment and California constitution in construing double jeopardy claim.)

Since independent state grounds exist for the state court decision in this case, in the form of article I section 15, certiorari should be denied on this point alone.

CONCLUSION

The statements amounting to a confession were not otherwise voluntary and trustworthy: they were concededly secured in violation of a constitutional right to counsel; independent state grounds exist to prevent their use for impeachment.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Charles R. Khoury Jr

Attorney for Respondent Cribas

APPENDIX "A"

I GUESS IT BOILS DOWN TO THIS: TO WHAT EXTENT MUST WE GO TO, YOU KNOW, SAVE PEOPLE FROM THEMSELVES AND THEIR OWN POOR JUDGMENT.

WITH RESPECT TO THE STATEMENTS THEMSELVES, I'VE READ THE TRANSCRIPT AND I'M AWARE THAT THE OFFICER TOLD HER, YOU KNOW, CERTAIN QUESTIONS TO ASK, CERTAIN THINGS TO INQUIRE INTO, BUT HE DIDN'T PUT THE PHONE IN THE DEFENDANT'S HAND AND HE DIDN'T PUT THE ANSWERS -- HE DIDN'T PUT THE ANSWERS IN HER MOUTH EITHER.

AND WHEN YOU'RE TALKING ABOUT A BRIEF RELATING TO A PENDING CHARGE, I DON'T THINK IT'S INAPPROPRIATE TO, UNDER THESE CIRCUMSTANCES, TO MAKE SURE THAT WE'RE TALKING ABOUT THE SAME CHARGE, THE FACTS UNDERLYING THE SAME CHARGE. IF FOR NO OTHER REASON TO DETERMINE THE VALIDITY OF THAT CHARGE AS IT MAY IMPACT THE BRIDE ATTEMPT.

FURTHERMORE, IF YOU LOOK AT THE -- IF YOU READ THE TRANSCRIPT IN ITS ENTIRETY, I DON'T THINK THAT OVERALL -- IT'S OBVIOUSLY NOT HELPFUL TO THE DEFENDANT, BUT DEPENDING ON ONE'S POINT OF VIEW, THE INITIAL QUESTIONS AND THE DEFENDANT'S ANSWERS TO THE QUESTIONS IN THE INITIAL PORTION OF THE TAPE ARE NOT UNEQUIVOCAL. THEY ARE AMBIGUOUS AND ALSO OBVIOUSLY IN RESPONSE TO QUESTIONS THAT ARE QUITE -- AND I THINK THAT -- TO PUT IT THIS WAY, I THINK THERE'S A LITTLE GOLD IN THERE FOR EVERYBODY.

BEST AVAI

AND LOOKING AT THEM AS A WHOLE, THE LATER PORTIONS THAT ARE VIRTUALLY UNDISPUTED ARE COMING IN. I REALLY DON'T SEE THAT THE DEFENDANT IS HARMED BY THE FIRST PORTION COMING IN IN LIGHT OF THE NATURE OF THE ANSWERS THAT WERE GIVEN OR THE MANNER IN WHICH THEY WERE GIVEN. CONSEQUENTLY YOUR MOTION TO SUPPRESS THE STATEMENTS BASED ON VIOLATION OF DEFENDANT'S RIGHT TO COUNSEL IS DENIED.

MR. ROZENBERG: DOES THE COURT WANT AN OFFER OF PROOF WITH RESPECT TO THE STATEMENTS OF CONSPIRACY?

THE COURT: RIGHT. YOU WERE GOING TO PROVIDE THAT.

MR. ROZENBERG: BASICALLY AS AN OFFER OF PROOF WHAT THE PEOPLE EXPECT THE EVIDENCE IS GOING TO BE IS THAT THE DAY SUBSEQUENT TO THE RAPE -- THE RAPE WAS ON A SATURDAY -- THAT NEXT SUNDAY THE DEFENDANT CALLED THE VICTIM AT HER HOME OFFERING HER MONEY IN EXCHANGE FOR HER HELP IN EXCHANGE FOR HIS RELEASE.

THE COURT: THE DEFENDANT OR CODEFENDANT?

MR. ROZENBERG: THE DEFENDANT LATER ON THAT DAY.

THE COURT: THAT WAS WHAT DAY?

MR. ROZENBERG: SUNDAY, THE DAY AFTER, APRIL 2ND.

THE NEXT DAY OR -- EXCUSE ME, LATER ON THAT DAY THE BROTHER, THE CODEFENDANT, ARRIVES AND DISCUSSES WITH THE VICTIM'S HUSBAND HELP AND MONEY IN EXCHANGE FOR THE RELEASE OF THE DEFENDANT.

ABLE COPY

BEST AVAILABLE COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

40

Dept

Court convened at 9:00 a. M November 15 19 89 present

Hon RICHARD J. BEACOM Judge Kay Mason Deputy Clerk

Jack Quinn Bailiff Crystal Koelle Reporter

and the following proceedings were had

C-74030 PEOPLE VS CRIBAS, Cesar Elias Madrid

In open court at 8:54 a.m. out of the presence of the jury. Defendant present with Deputy Public Defender Denise Gragg and interpreter Richard Antone Simmons. People represented by Deputy District Attorney Marc Rozenberg. Defendant's motion to suppress all of the telephonic taped conversation contained in Court Exhibit 1 on the grounds that it contained involuntary statements is denied. Defendant's motion to suppress the Defendant's admission regarding the rape on the grounds that the Defendant had a right to counsel is denied. Defendant's motion to exclude all statements made by Danilo Cribas on the grounds that it is hearsay is denied; the statements will come in subject to a motion to strike. Jury now present in their proper places at 9:24 a.m. Juror #5, Peggie A. Swanson, changes seats with juror #10, Bill Comer. Openine statement by People. Opening statement by Defendant. Luisa Brito was sworn and testified with the assistance of interpreter Anita Prieto. Diagram of aparatment marked People's Exhibit 1 for Identification. The Court admonished the jury and declared a brief recess. Defendant remanded to custody. Again in open court at 11:05 a.m. Defendant present with counsel and interpreter. People duly represented. Jury present. Luisa Brito resumed testimony with the

(continued on page two)

Charles R. Khoury Jr.
P.O. Box 1066
Wilton N.H. 03086

CASE NUMBER: 91-996

DECLARATION OF SERVICE

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of Hillsborough N.H. in which the mailing occurred and am not a party to the subject cause. My business address is P.O. Box 1066 Wilton, New Hampshire. I served the OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: Original and " copies to the Hon. William K. Suter, Clerk of the Supreme Court of the United States, One First Street NE, Washington D.C. 20543 of which a true and correct copy of that document was mailed to each addressee in a separate envelope named as follows:

Clerk, Calif. Supreme Court
3580 Wilshire Blvd
Los Angeles Calif. 90010

Court of Appeal
4th App. Dist Div 3
925 N Spurgeon St.
Santa Ana Calif. 92701

Michael R. Capizzi
District Atty

PO Box 808
Santa Ana Calif.92702-0808

Cesar Cribas
719 1/2 S. Sycamore St.
Santa Ana Calif. 92701

Office of the Attorney General
110 W. A St. Ste. 700
Attn P. Ratner Esq. Dep.AG
SD Calif 92101
Denise Gragg Esq.
901 Civic Cntr. Wst
Santa Ana Calif. 92703-2352
Suite 200
(trial counsel)

Orange County Clks Ofc.
Appls Sect.
700 Civic Cntr West
Santa Ana Calif.
for del. to Judge Beacom

Appellate Def Inc.
233 A St 12th Flr.
SD Cal. 92101

I declare under penalty of perjury the above statement is true.
Executed at Wilton N.H. on Feb. 18, 1992.

CRK

Charles R. Khoury Jr.